No. 92-1450

In The

Supreme Court of the United States

October Term, 1992

CYNTHIA WATERS, *et al.*,

Petitioners,

v.

CHERYL R. CHURCHILL, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions set forth by the Petitioners are not supported by the record or the opinion of the Court of Appeals. The following two questions are supported by both.

1. Does a public employer who terminates an employee on reports of speech critical of the employer which reports the employer concedes could have referred to protected speech on matters of public concern violate the First Amendment if the employer refuses to make a reasonable attempt to ensure that the speech was unprotected and the employee can make a substantial showing that it was protected?

2. In January, 1987, was a public employer entitled to qualified immunity for discharging an employee based on reports of speech critical of the employer which reports the employer concedes could have referred to protected speech on matters of public concern when the employer refuses to make a reasonable attempt to ensure that the speech was unprotected and the employee can make a substantial showing that it was protected?

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STATEMENT OF THE CASE

Respondent Cheryl Churchill sued petitoners Cynthia Waters, Kathleen Davis, Stephen Hopper, and McDonough District Hospital pursuant to 42 U.S.C. §1983 alleging she had been discharged in violation of the First Amendment.* The district court granted summary judgment to the Petitioners, and Churchill appealed. The United States Court of Appeals for the Seventh Circuit reversed and remanded to the district court for trial. The court held that genuine issues of material fact existed as to the content of Churchill's speech and whether the *Pickering (v. Board of Education,* 391 U.S. 563 (1968)) factors applied. The court held that if the content of the speech was as Churchill contended, it was protected as being on a matter of public concern.

A. The Cross-Training Policy

McDonough District Hospital (MDH) is located in Macomb, Illinois and is, under Illinois law, a municipal corporation.[1] MDH has several departments which deliver various specialized medical services. Among the departments is obstetrics (OB). Cynthia Waters was the nursing department head in OB, Kathleen Davis is and

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* The statement of the case is based on the record developed in the district court which was before the Court of Appeals. Sometimes Churchill makes specific reference to her appendix filed in the Court of Appeals by the designation "A" plus the page number.

[1] *Ill.Rev.Stat.* Ch. 23 §1264, et seq.

was the Hospital vice president for nursing, and Stephen Hopper is and was the president and CEO of MDH.

Respondent, Thomas Koch, M.D., has been the clinical head of OB[2] since 1980. He has the obligation to ensure appropriate delivery of medical care in OB and has always insisted on MDH maintaining nurse staffing levels which, at a minimum, comply with the requirements of the Illinois Department of Health.[3] Respondent Cheryl Churchill was a registered nurse in MDH OB from 1982 until her discharge in 1987.

In April, 1986, Petitioner Kathleen Davis became the vice president of MDH for nursing. She implemented a new nurse staffing policy called cross-training. Petitioner Cynthia Waters was the OB nurse department head responsible for implementing the policy in OB. Dr. Koch opposed cross-training and RN Churchill joined him in that opposition. Their opposition to cross-training focused on their perception that, as it was being implemented in OB, there was no systematic effort to train the non-OB nurses. Rather, nurses from less specialized

[2] The Obstetrics Department like the other departments in MDH had both a clinical head and an administrative head. The clinical head was a doctor who was ultimately responsible for the quality of medical care performed by the department. The administrative head was the doctor responsible for the credentialing of the doctors with staff privileges in the particular areas of medical speciality of MDH, such as obstetrics, surgery, etc. Doctors are not employees of MDH. Rather, they are granted staff privileges pursuant to the bylaws of the MDH medical staff and of MDH.

[3] 77 Ill. Admin. Code Ch. I §250.1830, sub. Ch. b(f) et seq.

departments[4] were sporadically sent to train in OB only by following the regular OB nurses through their rounds. Dr. Koch and Churchill believed that the regular OB nurses were diverted from giving appropriate attention to the patients by the obligation to "train" the cross-trainees thus creating a heightened malpractice risk. By the same token, Dr. Koch and Churchill felt the nurses' obligations to their patients precluded them from giving sufficient attention to the cross-trainees to afford them meaningful training.

Because Dr. Koch was outspoken in his insistence on appropriate nurse staffing levels and because Churchill agreed with Dr. Koch's objections, both were under scrutiny by the MDH administration beginning in the late summer of 1986. MDH President/CEO Hopper was maintaining a file in his desk of criticisms that were compiled about Dr. Koch by Waters and Davis. Waters was maintaining a similar file on Churchill.

B. The August 21, 1986 "Code Pink"

The Hospital administration's anxiety over Dr. Koch and Churchill erupted into a campaign to punish both of them beginning August 21, 1986. On that date, a "code pink" was ordered that required all available nursing and medical staff in MDH to report to the operating room in OB where Dr. Koch was performing an emergency

[4] Obstetrics nursing is generally regarded as a specialized nursing field.

caesarean section.[5] Dr. Koch directed Churchill to perform various particularized tasks. The "code pink" C-section was successfully concluded.

Waters did not arrive at work the morning of August 21 until after the "code pink" was underway. When she went into the operating room, she ordered Churchill out of the room to check on a patient. Churchill had just checked the patient prior to the beginning of the "code pink" procedure. Churchill obeyed Waters but told Waters she "didn't have to tell [Churchill] how to do her job." Dr. Koch was furious at Waters disrupting the procedure and directing nurse personnel from the room without his consent and contrary to his instructions. After the "code pink" procedure was concluded, Dr. Koch told Waters he wanted to talk to her.

Waters refused to talk to Dr. Koch alone because she knew he was upset. She called Hopper, who had told her he would help her anytime she needed help with regard to Dr. Koch and asked him if he would assist her. Hopper agreed to do that and the three of them met in a MDH conference room adjacent to CEO Hopper's office. In that meeting, Dr. Koch outlined his concerns respecting not just Waters' interference with his conduct of the "code pink" caesarean section that morning, but his position

[5] A "code pink" at MDH referred to the medical emergency when the life of a mother, her baby or both was in immediate danger. When a "code pink" is called, ali available medical personnel are required to report to the room where the emergency is occurring to render assistance as directed.

respecting the situation in OB generally. Hopper took notes of that meeting.[6]

C. The Unsuccessful Campaign To Deny Dr. Koch Reappointment to The Medical Staff

After the meeting involving Hopper, Waters and Dr. Koch, Hopper and Waters met the next day with Davis and with Dr. Jack McPherson, the medical administrative head of OB. As the administrative head of OB, Dr. McPherson was responsible for either recommending or not recommending Dr. Koch and the other physicians with OB privileges for reappointment to the medical staff for the oncoming year, 1987. Hopper and Waters did not advise McPherson and Davis of Dr. Koch's concerns as recorded by Hopper. Instead, they advised him that Dr.

[6] According to Hopper's notes, Dr. Koch made the following points: Dr. Koch felt that three other nurses besides Cheryl Churchill were picked on by Cindy Waters. He had seen no progress on items which had been discussed in a June meeting of the Obstetrics Department. A certain nurse was a hazard on the night shift. Dr. Koch didn't feel that it was appropriate to train three orientees at once. Nurses who weren't ready to work on their own should not be on staff at night. Dr. Koch wanted equal treatment for all people. He didn't think rotation in the nursery was satisfactory. Staff nurses were afraid to speak to Cindy Waters. Dr. Koch wanted to make people working in OB happier. He felt that some major clinical matters should come to his attention. He felt that Cindy Waters should give fair and consistent direction to the staff and that if Cheryl Churchill [was] in fact doing something wrong she, like anybody else, should be corrected. Hopper noted that Dr. Koch and Cindy Waters concluded the meeting by hugging each other. A. 128-129.

Koch was temperamental and out of control. They discussed taking the matter to the medical staff credentials committee which met in November, 1986, for the purpose of keeping Dr. Koch from being reappointed to the medical staff for 1987. Hopper, Waters and Davis also decided to issue Churchill a "written warning" for "insubordination" based on her comment "you don't have to tell me how to do my job."[7]

Hopper and Waters then met on August 25, 1986, with Dr. Roger Lefler, chief of the medical staff and ex-officio member of the medical staff credentials committee. Hopper and Waters brought to Lefler's attention their concerns about Dr. Koch's temper. Rather than advising Dr. Lefler of Dr. Koch's concerns as Hopper had recorded them on August 21, 1986 (n.6, *supra*), Waters resurrected a complaint she had against Dr. Koch dating to 1982, when Dr. Koch had reported on a medical progress chart that inadequate nurse staffing was the reason for the near fatal birth of a baby.[8] Hopper and Waters also told Lefler

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[7] A written warning was step two in a progressive discipline scheme consisting of first, a verbal counseling, second, a first written warning, third, a final written warning which [could] include suspension and last, discharge.

[8] On September 8, 1982, Dr. Koch had a labor patient in OB and MDH administration had moved nursing staff from OB to another department with the acquiescence of Waters, but over Dr. Koch's vigorous opposition. Dr. Koch feared that moving nursing staff from OB made the department less able to meet emergencies which developed. That fear had materialized when, because of another emergency, Dr. Koch's labor patient went unattended for 65 minutes during which the fetus was not getting sufficient oxygen. Dr. Koch was summoned and delivered the baby which was born dead. He was able to revive the baby but it suffered mild retardation. Dr. Koch noted the inadequate nurse coverage because of the other emergency in a medical progress note. Waters was angered that Dr. Koch made that notation and her anger manifested itself four years later in the August 25, 1986 meeting with Dr. Lefler. The baby's parents sued MDH and Dr. Koch. The Hospital paid a $200,00 settlement and Dr. Koch went to trial and was exonerated of malpractice by a jury.

that Dr. Koch cared only about "himself [and] Cheryl." Also on August 25, 1986, Waters and Davis delivered the written warning to Churchill for "insubordination" for her "you don't have to tell me how to do my job" statement.

The credentials committee of the medical staff met November 10, 1986, and admitted with full staff privileges all doctors who had applied except Dr. Koch. Dr. Koch's application was tabled on Dr. Lefler's motion made after representations by Hopper and McPherson. Hopper volunteered to check with MDH lawyers and determine what legal exposure anyone who recommended against Dr. Koch's reappointment might have.

The hospital medical staff credentials committee met again on December 8, 1986, at which time Hopper and McPherson attempted to avoid McPherson's duty under the medical staff by-laws to recommend for or against Dr. Koch's reappointment by asking the committee itself to recommend against his reappointment. However, the chairman of the credentials committee required McPherson to recommend or not recommend Dr. Koch's reappointment on the prescribed form pursuant to the

medical staff bylaws. McPherson then recommended Dr. Koch's reappointment by completing and signing the required "reappraisal" form. Dr. Koch was then reappointed for the 1987 calendar year.[9]

D. The Campaign To Discharge Churchill

On January 5, 1987, Churchill received her evaluation covering the preceding six months.[10] That evaluation showed standard or above standard performance in all 50 objective categories of performance. It showed that she had corrected what Waters had perceived was a problem in the June, 1986, evaluation of not "separating personal from professional concerns", a reference to what MDH perceived as Churchill's friendship with Dr. Koch. The evaluation also specified that Churchill "display[ed] a positive attitude" and was "constructively working to change things which should be changed." A. 125. At the conclusion of the printed form of evaluation, however, Waters wrote by hand that she observed "negative behavior" on Churchill's part.[11] Waters did not specify any

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[9] For the last two years Dr. Koch has served as the duly elected chief of the medical staff.

[10] Throughout her entire employment history at MDH, Churchill had received standard to above standard employment evaluations.

[11] The handwritten comments read in full: "Cheryl exhibits negative behavior towards me and my leadership – through her actions and body language, i.e. no answer, one word abrupt answers followed by turning around and leaving, blank facial expressions or disapproving facial expressions. This promotes an unpleasant atmosphere and hinders constructive communication and cooperation."

incident. Waters met with Churchill on January 5, 1987, respecting the evaluation. They had a "professional" discussion relative to OB staffing policies. Waters did not elaborate on her handwritten note about "negative behavior."

In fact, however, Waters had written the "negative behavior" remarks on the evaluation form after consultation with Davis and Hopper. They were creating a record of a "seocnd written warning" incident to MDH's "progressive discipline" scheme where the third written warning could result in discharge.

E. The January 16, 1987 Dinner Conversation

On January 16, 1987, Churchill reported for work for the 3:00 p.m. to 11:00 p.m. shift, her customary shift. By reason of a staffing change, Mary Lou Ballew was assigned to that shift as well.[12] In addition, a "cross-trainee", Melanie Perkins-Graham (Graham), was assigned to OB for that shift. Ballew arrived for work at 5:00 p.m., two hours after the shift began.

The custom on the shift was that the mothers were taken their dinners between 4:30 p.m. and 5:00 p.m. after which the nurses on duty ate, generally between 5:00 p.m. and 6:00 p.m. The nurses customarily ate in a

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[12] Ballew had been hired in August, 1986. She had just completed a 90 day probationary period. After the August 21, 1986 "code pink" C-section, she had learned from Waters that Dr. Koch and Churchill were viewed in disfavor by the MDH administration. After that date, she reported several incidents concerning Dr. Koch to Waters which displeased Ballew. Those were among the incidents Waters turned into Hopper which Hopper maintained in his file on Dr. Koch in his desk.

kitchen area situated behind but within earshot of the main nurses station.

Churchill and Graham finished their tasks after which, about 5:00 p.m., they went to the kitchen area to eat their dinners just as Jean Welty, the shift supervisor and senior nurse in OB was leaving. Welty went to the desk area where she answered the phone announcing a new patient. Ballew, having just arrived at work, was standing behind the main desk. Ballew could not see who was in the kitchen area but could hear voices through the open door. Prior to January 16, Ballew did not know Graham and had only an acquaintance with Churchill.

Sometime after his office closed at 5:00 p.m., Dr. Koch arrived to do his customary rounds. After his rounds, Dr. Koch went into the kitchen area where Churchill and Graham were eating. He asked Graham what she was doing in OB and she said she was there to cross-train and was thinking about transferring to OB. Graham said that she was glad it was not busy because it was difficult to cross-train in OB.

With that statement, Churchill, Graham, and Dr. Koch began a general 20 minute discussion about the cross-training policy. Shift supervisor Welty, who was filling out a chart on the new patient at the desk immediately outside the door, listened "very closely" to the conversation because she was interested in how Graham from the general surgical, a less specialized nursing floor of MDH, reacted to the cross-training policy.

Welty heard Dr. Koch express his views that cross-training's application in OB harmed patients and increased malpractice risks and costs. She heard

Churchill agree and say further that Davis' policy as it was being implemented in a sporadic, hit or miss fashion was going to "ruin" the Hospital. She also heard Churchill say that sending a cross-trainee to OB in place of a regular OB staff nurse to create the appearance of complying with Illinois Department of Health regulations was probably a violation of those regulations. Welty said Graham agreed with those views and that all participants contributed equally to the conversation. At the end of the conversation, Welty heard Graham say she was considering transferring to OB but heard bad things about Cindy Waters. Welty heard Churchill encourage her to transfer, saying that Cindy Waters had good intentions but was sometimes "moody".

Churchill also provided testimony about the conversation. She recalled saying that cross-training as a concept had merit if applied effectively. She said that to be effective, cross-training had to be structured with the same people participating on a regular basis to achieve consistent and frequent exposure to the Obstetrics Department. Churchill recalled that she said that the cross-training program was not fair to patients because when a nurse cared for a patient, the patient was entitled to assume that the nurse was knowledgeable which was not the case if the nurse was in fact a cross-trainee. She also recalled saying that in an emergency situation, a cross-trainee would not be competent which was unfair to the patient.

Churchill admitted she said that Davis' cross-training policy was going to "ruin the Hospital" if it were not changed. She said that Davis and the administration were more concerned about marketing and business matters

than the delivery of nursing services and that Waters concurred with the administration.

Churchill further testified that at the end of a 20 minute conversation, Graham said she heard that Waters was difficult but did not know her personally. Churchill replied that Waters "had her moods" owing to the stress of her job but that should not deter Graham from transferring to OB. Churchill described the situation in her last evaluation (January 5) when Waters had given Churchill a good evaluation both on the form and verbally but had written inconsistent remarks at the end of the evaluation which had "confused" Churchill.

Dr. Koch corroborated Welty's and Churchill's recollection of what was said. He recalled Graham commenting she had heard criticisms of Waters and Churchill attributing those criticisms to Waters' moods. He remembered those remarks came in the last two minutes of what he recalled was a 15 to 20 minute conversation.

Ballew testified she was answering patient lights when the conversation was taking place. She did not see who was in the kitchen area, just heard voices. She heard "snatches and pieces" and less than one minute of the conversation and was not paying much attention to it.

F. The Ballew And Graham Reports Of The Conversation

Nevertheless, Ballew assumed that the conversation was negative and had dampened the "enthusiasm" of Graham, although she never talked to Graham about the conversation. Four days later, on January 20, 1987, Ballew

orally advised Waters that she (i) "overheard something the other night on the 3-11 shift which was not good and . . . should not be happening and [Ballew] [wanted] [Waters] to be aware of its happening," and (ii) that "Cheryl took Melanie . . . into the kitchen for a period of at least 20 minutes to talk about you and how bad things are in OB in general." Waters advised Hopper and Davis of what Ballew had told her.

On January 23, 1987, Davis and Waters met with Graham in Davis' office. Graham was "nervous", "frightened" and "reluctant to talk." Waters and Davis told Graham they heard that Churchill had criticized the Hospital and they wanted confirmation of what they had heard. They told Graham she need not worry. Graham agreed to talk and said "she would not lie about it." Graham then agreed that Churchill had said (i) "unkind and inappropriate negative things about Cindy Waters"; (ii) "that just in general things were not good in OB and the Hospital administration was responsible"; (iii) that Kathy [Davis] was "ruining" the Hospital; (iv) that Churchill had discussed her evaluation and that Waters wanted to wipe the slate clean; and (v) that Churchill had said that Waters had knowledge of everything Churchill was saying because Churchill had said it directly to Waters. Graham said she could not remember the conversation "very specifically" but did remember that it took 20 minutes. Neither Waters nor Davis asked Graham whether her enthusiasm had been "dampened" by her conversation with Churchill and Graham did not say it had been.

Waters had one subsequent meeting with Ballew at which Ballew confirmed what she initially reported and

agreed to "swear" to it. Waters, Davis and Hopper did not question anyone else concerning the conversation. Davis believed Ballew's and Graham's reports provided all the evidence they needed to terminate Churchill.

G. The Discharge of Churchill

On January 26, 1987, Hopper, Waters and Davis met and decided to terminate Churchill which Waters and Davis did on January 27, 1987. They told her she had continued to "undermine the department and Kathy Davis and the whole administration." Waters and Davis were referring to Churchill's speech of January 16, 1987. Waters admitted that Churchill's speech as reported could have been criticism of the cross-training policy. A. 767-768, 771-772.

After she was discharged, Churchill filed a grievance with Hopper.[13] Hopper upheld Churchill's discharge and concluded that Churchill's speech was her third offense within a twelve month period, the written warning of August 25, 1986, and the "negative behavior" comments at the end of her January 5, 1987, evaluation being the first two. Hopper admitted that Churchill's speech of January 16 as reported could have concerned the cross-training policy, A. 484-489, 524-530. Hopper took offense

[13] She was told by the personnel director that since her grievance challenged her firing, it properly lay against Waters and Davis who, Churchill was advised, had effected her discharge. She was not told that Hopper also played a major part in effecting her discharge.

at Churchill's statement that Davis was "ruining the Hospital." He felt that statement "undermin[ed] the work Kathy Davis [was] trying to do in the Hospital" because he "[didn't] agree with the statement." Beyond that, all Hopper could say was wrong with Churchill's speech was that "she was voicing it to the wrong forum." A. 484-489. However, Hopper did not permit Churchill to discuss the cross-training situation when she met with him in furtherance of her grievance, saying "he didn't want to get into that." Pet. App. 75-76.

Jean Welty, the shift supervisor who heard all of Churchill's speech, testified that it disrupted nothing. Most OB nurses had never heard of Churchill's conversation. Welty felt Churchill was discharged because of her friendship with Dr. Koch, a view shared by medical chief of staff, Dr. Lefler.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS RELY ON FACTUAL ASSERTIONS THAT ARE EITHER NOT SUPPORTED OR ARE IN DISPUTE IN THE SUMMARY JUDGMENT RECORD.

"On summary judgment, the inferences to be drawn from the underlying facts contained in such [summary judgment], materials must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold*, 369 U.S. 654, 655 (1962). Petitioners, however, characterize the factual record in the light most favorable to themselves though they were the moving parties. They

do that in three particulars, the character of Churchill's speech, the quality of the reports concerning her speech they received, and Churchill's employment history.

A. On Summary Judgment, Churchill's Speech Cannot Be Characterized As "Insubordinate."

Permeating the entirety of the Petition is the characterization of Churchill's speech as "insubordinate". On the record, the most that can be said about Churchill's speech as reported to the Petitioners which inspired their retaliatory action is that it was critical of policies of MDH supervisory personnel, but consistent with the public mission of MDH.

This case is contrary to the situation in *Connick v. Myers*, 461 U.S. 138, 154 (1983),[14] where only one out of fourteen items on the plaintiff's questionnaire referred to a matter of public concern. Here, of the seven items reported to Petitioners by Graham and Ballew, only one, the statement concerning Churchill's evaluation, most likely did not involve a matter of public concern. As acknowledged by both Waters and Hopper, the remaining points as reported could as well have involved criticism of cross-training and nurse staffing policies (p. 13, *supra*)

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[14] Petitioners rely on the *Connick v. Myers* statement that a "public employer need not 'tolerate action which he reasonably believe[s] would disrupt the office, undermine his authority, and destroy close working relationships,' " Pet. at 11. However, *Connick* applies where the public employee's speech implicates the public concern "in only a most limited sense . . . " and the overall import of the speech is "most accurately characterized as an employee grievance concerning internal office policy." 461 U.S. at 154.

which Churchill said were contrary to effective patient care and which the Petitioners have admitted to be matters of "obvious public concern." Petitioners' Brief in Court of Appeals, p. 38.

B. On Summary Judgment, Ballew's And Graham's Reports Cannot Be Characterized As "Credible."

Petitioners' statement of the quality of the reports they received as "credible", Pet. i, 12, 20, is erroneous on summary judgment, *United States v. Diebold, supra*, as it is disputed and not supported by the record. For example, the evidence showed that Ballew (i) was answering patient lights when the speech took place, A. 900; (ii) did not see who was in the kitchen area, but just heard voices, *Id.*; (iii) heard only "snatches and pieces" and "bits and pieces" of the conversation, A. 887, 900, 903, 905-907; (iv) was not paying attention to the conversation, A. 902-903; (v) said the conversation "[didn't] make any sense" to her, A. 905; (vi) heard only 50 seconds of what she thought was a 45 minute conversation. A. 906.[15] The evidence also showed that Graham's report was not reliable because, as Petitioners' own notes show, Graham (i) was "intimidated" and "reluctant to talk" and (ii) "could not remember everything specifically. . . . [16] A. 146.

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[15] Petitioners state that they spoke to Ballew three times. Pet. 17. That is inaccurate. They spoke to her one time and confirmed with her what she had said in a second meeting and got her to agree to "swear" to it.

[16] She had reason to be "reluctant" as Churchill's evidence showed it was Graham, not Churchill, who made comments personally derogatory of Cindy Waters. And, far from the

C. On Summary Judgment, Churchill's Work History Cannot Be Characterized As "Insubordinate."

Petitioners have relied on disputed assertions concerning Churchill's work history. Up to two weeks before her discharge, she was, as acknowledged by Petitioners, a standard to above standard employee who "display[ed] a positive attitude" and was "constructively working to change things which should be changed." A. 125. Two weeks before her discharge, she was recommended for a raise. Nevertheless, she was perceived by Petitioners as an ally of Dr. Koch's respecting nurse staffing issues. That perceived alliance caused them both to be the subject of Petitioners' retaliatory efforts beginning in the late summer, 1986, which resulted in Churchill's discharge.

II.

THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENTS AS IT ADHERES TO THE STANDARD PROHIBITING ONLY INTENTIONAL VIOLATIONS OF PUBLIC EMPLOYEES' RIGHT TO SPEAK ON MATTERS OF PUBLIC CONCERN.

A.

In *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court held that a plaintiff

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speech "dampening the enthusiasm" of Graham as assumed by Ballew, shift supervisor Welty testified she talked to Graham at the end of the shift and Graham told Welty, "she had enjoyed working with [the OB nurses] and would give careful consideration" to transferring to OB. A. 421-422. Welty also testified that she was never questioned by MDH administrators concerning the speech or any effect it may have had.

was obligated "to show that [her] conduct was constitutionally protected, and that this conduct was a 'substantial factor' – or to put it in other words, that it was a 'motivating factor' " in the termination decision. 429 U.S. at 287. In *Mt. Healthy*, the Court followed a test of causation which it had previously established in discrimination contexts. *Village of Arlington Heights v. Metropolitan Housing District*, 429 U.S. 252, 264-65 (1977) and *Washington v. Davis*, 426 U.S. 229 (1976).

The Seventh Circuit adhered to the *Mt. Healthy* test of causation in this case. It did so by holding that speech was conduct and the plaintiff by having shown that she was fired for having engaged in the conduct of speech which could have been on a matter of public concern had satisfied the *Mt. Healthy* causation test. The court held that it was not necessary that the employer knew the "precise content of the speech." 977 F.2d at 1127. That decision is consistent with long established First Amendment principles.

The Court of Appeals in this case did no more than interpret *Mt. Healthy* so as to "be sure that the speech in question actually [fell] within the unprotected category." *Bose v. Consumers Union*, 466 U.S. 485, 505 (1984). It did no more than apply the *Mt. Healthy* causation so as to "confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression [would] not be inhibited." *Bose, supra.*

The Seventh Circuit's application of *Mt. Healthy* to this case is sound, fair, practical and consistent both with protection of First Amendment values and the legitimate

concerns of public employers. The Petitioners have conceded that Churchill's speech was protected conduct if on a matter of public concern. They have conceded her speech as conduct was the motivating cause of her discharge. They have admitted that for all they knew her speech was on cross-training and was, therefore, on a matter of public concern. Defendants have, therefore, implicitly conceded that they may have intentionally terminated Churchill because she engaged in constitutionally protected speech. The only issue is whether the speech was in fact on a matter of public concern. The resolution of that issue, as the Seventh Circuit correctly held, depends upon whether a fact finder believes plaintiff and her witnesses or Ballew and Graham. *Mt. Healthy, supra.*

B.

In addition, the record shows Churchill's speech was given in a context broader than the Petitioners paint. It shows a context from which the intent to punish Churchill because of her views can be demonstrated. As held by this Court in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 267 (1977), "[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." Thus, the Court said, "[t]he specific sequence of events leading up to the challenged decision . . . may shed some light on the decision maker's purposes." *Id.*

The record as it must be viewed on summary judgment, *United States v. Diebold, supra,* shows that Hopper,

Waters and Davis were hostile to Dr. Koch and his insistence that proper staffing levels be maintained. Moreover, Dr. Koch's position, supported by Churchill, respecting staffing was at odds with the attempted implementation of the cross-training policy in OB. After the dispute created during the emergency caesarean section, "code pink" of August 21, 1986, when Waters ordered Churchill from the operating room, the Petitioners put in motion the strategy to strip Dr. Koch of his staff privileges and to fire Churchill. The strategy failed as to Dr. Koch, but it succeeded as to Churchill as a result of her speech of January 16, 1987.

III.

THE LOWER COURT'S DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF ANY CIRCUIT AND THE CASES RELIED UPON BY PETITIONERS ARE DISTINGUISHABLE ON THEIR FACTS.

Petitioners rely on *Wulf v. City of Wichita,* 883 F.2d 842 (10th Cir. 1989), and *Sims v. Metropolitan Dade County,* 972 F.2d 1230 (11th Cir. 1992), as being in conflict with the decision below, The decision below, however, is fully reconcilable with both *Wulf* and *Sims.*

The question in *Wulf* was whether city manager Denton who relied on Police Chief LaMunyon's report that plaintiff was "insubordinate" in firing plaintiff was liable under §1983. The evidence in *Wulf* showed that Denton was not motivated at all by Wulf's speech when he decided to terminate Wulf. Rather, Denton had been told that Wulf had improperly refused to comply with a police department investigation. 883 F.2d at 862. Thus, Wulf's

speech "was not a substantial motivating factor in *Denton's* decision", *Id.* at 863 (emphasis in original), and Denton had no obligation to investigate the full content of Wulf's speech. That is contrary to the situation in this case where Petitioners knew that Churchill had criticized her superiors and terminated her precisely for that reason.

Of course, only Hopper is a possible beneficiary of *Wulf* because Waters and Davis knew the details about the contents of Churchill's speech. But, that benefit would apply only had Hopper not played, as he did, a substantial role in instigating the discharge of Churchill. For example, *Wulf* would help Hopper had Hopper merely reviewed a recommendation by Waters and Davis to terminate Churchill for "insubordination" altogether without reference to speech and he then failed to look behind the report to determine that speech was involved.

But, unlike the situation of Denton in *Wulf*, Petitioners in this case were dealing with reports of only Churchill's speech, not with conduct at all. The Petitioners had no license on the basis of those reports to unilaterally construe the speech as personal and unprotected and discharge her. If that rule were adopted, the right of public employee free speech on matters of public concern would be effectively eliminated. The rule would encourage all employers to refuse to investigate the truth because they could hide behind their deliberate ignorance of the content of the employee's speech.

Sims v. Metropolitan Dade County, supra, likewise does not conflict with the Seventh Circuit's decision. In *Sims*, the plaintiff was employed by Dade County to "investigate concerns of the Miami community's various ethnic

groups and attempt to ease the tensions among such groups." *Sims, supra,* 972 F.2d at 1232. Sims also served as a Baptist minister to a congregation consisting of primarily African-Americans separate from his governmental duties.

Racial tensions developed in Miami between African-Americans and Cubans. In a sermon given at his church, Sims made statements reported by a Spanish language newspaper which the Cuban community construed as inflammatory. Sims claimed he was misquoted. The defendants suspended him for three days on the basis of the newspaper reports of his statements even though they were aware of his claim that he was misquoted.

The Eleventh Circuit in *Sims* said that the law did not require "omniscience" on the part of employers in investigating employee conduct. *Sims, supra,* 972 F.2d at 1234. Churchill agrees. But, the court did say that the law did require an investigation "thorough enough to support a reasonable person's conclusion that action based [on employee conduct] would not violate clearly established law." *Id.* In *Sims*, the employer *did* conduct a reasonable investigation and concluded the content of Sims' speech was "inflammatory." *Sims* is plainly distinguishable from this case where the ultimate firing authority, Hopper, conducted no investigation into Churchill's speech and refused to allow her to present her side of the story in support of her grievance.

Thus, the *Sims* requirement of reasonableness is not met when, as in this case, an employer takes action on the basis of the report of an eavesdropper who hears 50 seconds of a speech she didn't understand and confirms

the report in a coercive setting from someone whom the employer acknowledges didn't remember the speech specifically. That is manifestly so when, on the basis of the report and confirmation, the employer acknowledges the speech could have been either protected or unprotected depending upon what in fact was said and was not otherwise contrary to the employee's job function or the mission of the agency. *Sims* does not help the Petitioners in this case. Rather, by emphasizing that an employer act reasonably in response to critical speech by personnel, it underscores the correctness of the Seventh Circuit's decision.[17]

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[17] Petitioners also cite *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980), a patronage discharge/hiring case. The court in *Tanner*, however, simply refused to find any inference of a political animus in the hiring of the newly elected sheriff's deputies or the firing of the defeated opponents from the fact of the election followed by the fact or personnel changes. The court painstakingly went through the snippets of testimony relied upon by the plaintiffs to show such animus and any fair reading of those snippets demonstrates the correctness of the court's decision. In *Atcherson v. Siebenmann*, 605 F.2d 1058 (8th Cir. 1979), which is likewise distinguishable, a judge who oversaw a county probation department did no more than rely upon the report of his chief probation officer about plaintiff's activities which consisted of on-premise speech critical of her fellow employees which occurred before this Court's decision in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), which held that on-premise public employee speech is protected. Thus, the right plaintiff asserted was not clearly established. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

IV.

THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S PRECEDENTS AS ENSURING THAT SPEECH THAT COULD BE PROTECTED SPEECH ON MATTERS OF PUBLIC CONCERN IS NOT PUNISHED BY RETALIATORY ACTION.

In *Speiser v. Randall*, 357 U.S. 513, 521 (1957), this Court held that "before a [public employer] undertakes to restrain [and punish] unprotected speech, it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights – rights which we value most highly and which are essential to the workings of a free society." Cf. *Mt. Healthy, supra*, 429 U.S. at 287. In *Chicago Teachers v. Hudson*, 475 U.S. 292 (1986), this Court affirmed the Seventh Circuit in holding that "First Amendment rights are fragile and can be destroyed by insensitive procedures." *Chicago Teachers, supra*, 475 U.S. at 303 n.12. Thus, " 'procedural safeguards . . . have a special bite in the First Amendment context.' " *Id.* That is because the First Amendment "requires that procedures be carefully tailored to minimize the infringement." *Id.* "[T]he purpose of [those] safeguards [is] to ensure that the government treads with sensitivity in areas freighted with First Amendment concerns." *Id.*[18]

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[18] See for example the different contexts in which procedural safeguards are applied to ensure that potentially protected First Amendment activity is not infringed by efforts to restrict or punish unprotected activity. Monaghan, *First Amendment Due Process*, 83 Harv.L.Rev. 518, 520-524 (1970).

The essential principle set forth in *Chicago Teachers* was earlier acknowledged by this Court in a retaliatory discharge setting in *Board of Regents v. Roth,* 408 U.S. 564 (1972). There, relevant to this case, this Court said that when the state has "directly [impinged] upon interests in free speech or free press, . . . opportunity for a fair adversary hearing must precede the action [to determine], whether or not the speech or press interest is clearly protected under substantive First Amendment standards." *Board of Regents v. Roth, supra,* 408 U.S. at 574-575 n.14. However, this Court in *Roth* declined to apply that principle because allegations of direct impingement of protected speech were not before it. But, this case squarely presents allegations of direct governmental impingement of protected speech.

The whole point of employing "sensitive procedures" before taking action which might infringe First Amendment protected freedoms is a corollary of the rule of *Connick v. Myers, supra,* 461 U.S. at 148, that a court must consider the "whole record" and of *Rankin v. McPherson,* 483 U.S. 378, 386 n.9 (1987), that a court must "assure [itself] that the judgment 'does not constitute a forbidden intrusion on the field of free expression.' " For that proposition, this Court in *Rankin* relied upon its earlier decision in *Bose v. Consumers Union, supra,* 466 U.S. at 507-508. In *Bose,* 466 U.S. at 504 n.22, the Court recognized that statements of public employees not on matters of public concern were unprotected speech which were required to be kept within "narrow limits." The Court said:

> "the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the

> judicial evaluation of special facts that have been deemed to have constitutional significance. In such cases, the Court has regularly conducted an *independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not inhibited."*

Bose, supra, 466 U.S. at 505 (emphasis supplied). The Seventh Circuit in this case followed its obligations under *Bose, supra.*

V.

IT WAS CLEARLY ESTABLISHED IN JANUARY, 1987, THAT A PUBLIC EMPLOYEE COULD NOT BE DISCHARGED FOR ENGAGING IN ON-PREMISES PRIVATE SPEECH ON A MATTER OR PUBLIC CONCERN WHICH DID NOT INTERFERE WITH THE EMPLOYER'S DISCHARGE OF THE PUBLIC FUNCTION.

After *Anderson v. Creighton,* 483 U.S. 635 (1987), a court must determine whether a public official violated clearly established rights in light of the information reasonably available to him. The question in this case for qualified immunity purposes is, whether it was clearly established in January, 1987, that a public employee had a right to engage in on-premises private speech which the employer knew could have been on a matter of public concern critical of the policies of the public employer. That is the level of specificity at which this case must be analyzed, *Anderson v. Creighton, supra,* 483 U.S. at 641, because that what the Petitioners knew when they fired

Churchill. The affirmative answer to that question was given in *Pickering, supra,* in 1968, in *Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979), in 1979 and in *Bose v. Consumers Union, supra,* in 1984.

Petitioners say, "there was nothing to put them on notice that Ballew's and Graham's reports might be inaccurate or that Churchill's speech might have focused on matters of public concern, because they were of public concern." Pet. 20. They say the Seventh Circuit has created a "standardless duty to investigate."[19] Petitioners

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[19] In their Petition at 21, n.18, the Petitioners argue that the Seventh Circuit ignored its own holding in *Elliott v. Thomas,* 937 F.2d 338 (7th Cir. 1991). That is inaccurate. *Elliott v. Thomas* involved the plaintiff Barbara Probst who had been transferred from the university laboratory for what she claimed was speech criticizing her superior's alleged conflict of interest. But, the university officials were advised only that the conditions in the laboratory had deteriorated because of a bad personnel situation altogether without reference to speech. The university said they transferred her for that reason. The Seventh Circuit held that the question for qualified immunity purposes was "not what the conditions in the laboratory *were;* it is what the administrators reasonably believed them to have been." 937 F.2d at 343, 344 (emphasis in original). Probst offered "no reason other than her suspicions to doubt the [university's] account of its [actions]. 937 F.2d at 346.

Petitioners argue that doctrine applies to this case. They say the characterization of Churchill's speech, "negative" and "inappropriate" by Ballew and Graham puts them in the same position as was the university when it heard that conditions had deteriorated and transferred Probst for that reason.

Two fundamental points defeat Petitioners' position. First, they cannot escape that it was Churchill's speech, not deteriorating conditions, or anything else which precipitated her discharge. Second, they have admitted her speech may have been protected as being on a matter of public concern. A third point

have overlooked this Court's precedents regarding values protected by the First Amendment in light of qualified immunity principles.

Petitioners were on notice from 1968 that public employee speech on matters of public concern was presumptively protected. *Pickering v. Board of Education, supra.* From Ballew and Graham, they received reports that Churchill's speech was critical of MDH and supervisory personnel. They have conceded those reports could have encompassed protected speech. In light of that information, a reasonable officer could not have failed to believe that Churchill's speech was potentially protected. *Hunter v. Bryant,* 112 S.Ct. 534, 536 (1991). Consequently, a reasonable official could not have failed to realize that taking retaliatory action necessarily risked punishing protected speech. *Id., Pickering, supra; Bose, supra,* 466 U.S. at 505; *Connick, supra.*

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also distinguishes this case from *Elliott v. Thomas,* and that is that it was not reasonable for Petitioners to accept Ballew's and Graham's report as accurately representing Churchill's speech or its effects. See discussion, *supra,* at 17.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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